No. 983

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALASKA FISH AND LUMBER COMPANY,

Plaintiff in Error,

vs.

EDWARD A. CHASE,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

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Reports of Circuit

Court of appeals

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In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,

Plaintiff,

vs.

ALASKA FISH AND LUMBER COMPANY,

Defendant.

Complaint.

Now comes the above-named plaintiff, and for cause of action against the above-named defendant alleges:

1.

That defendant is a corporation duly incorporated under the laws of the territory of Arizona, but doing business and having property within the District of Alaska, Division No. 1.

2.

That plaintiff is now and has been for many years a fisherman, engaged in the business of superintending the taking, canning, and otherwise preparing for the market, salmon and other fish in large quantities; and such business is his calling and vocation in life.

3.

That heretofore, to wit: On the 14th day of February, 1902, the plaintiff and defendant made and en-

tered into a contract and agreement wherein and whereby the defendant employed the plaintiff for the period of one year, beginning March 1st, 1902, as superintendent, or foreman, for defendant in its fishing and canning business, at an agreed and stipulated consideration to be paid by defendant, of $200.00 per month, board and lodging for the said year, and expenses in traveling to and from Seattle, Washington, to Alaska. A copy of said contract is hereto attached, marked Exhibit "A" and made a part hereof.

4.

That immediately after the execution of said contract, the plaintiff pursuant to said contract, and the directions of the defendant, came to Shakan, Alaska, and took charge as superintendent of the defendant's salmon canning establishment at that place. That thereafter, plaintiff faithfully performed all the duties required of him, as such superintendent, and fully performed his part of said contract until the 24th day of June, 1902; and was then and has ever since been ready, willing and able to perform his said duties as such superintendent under and pursuant to said contract.

5.

That on the said 24th day of June, 1902, defendant without cause and in violation of said contract, discharged plaintiff from his employment, and refused to permit him to perform further said contract.

6.

That the said business mentioned above is of such

a nature that is is customary and necessary to secure employment therein by the year or for the whole season of fishing and canning, and plaintiff, although he has endeavored so to do, has not been able, and will not be able, prior to the beginning of the next season of fishing, to wit, about March 1st, 1903, to secure any employment and will during the whole period from June 24th, 1902, to March 1st, 1903, be left without employment and compelled to support himself at his own expense.

7.

That defendant has only paid plaintiff the sum of $766.66 on his wages due and to become due under said contract, and refuses to pay plaintiff's expenses to Seattle, or to pay his board and lodging, from and after said 24th day of June 1902; that by reason of the breach of contract by defendant as aforesaid, plaintiff has been damaged in the following sums, to wit:

For loss of wages.....	$1633.33
Expenses for board and lodging.....	410.00
Expenses return trip to Seattle.....	25.00
Making an aggregate of	$2068.33

Wherefore, plaintiff prays judgment against defendant for the sum of two thousand sixty-eight and 33-100 ($2068.33) together with costs herein incurred.

MALONY & COBB,
Attorneys for Plaintiff.

United States of America,
District of Alaska } ss.

Edward A. Chase, being first duly sworn, deposes and says: I am the plaintiff in the above-mentioned action; I have heard read the foregoing complaint and know the contents thereof, and the matters and things therein set out are true, as I verily believe.

[Seal] EDWARD A. CHASE,

Subscribed and sworn to before me this 2d day of October, 1902.

[Seal] J. H. COBB.
Notary Public in and for Alaska.

[Endorsed]: No. 183. In the United States District Court in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish & Lumber Co., Defendant. Complaint. Filed Oct. 3, 1902. W. J. Hills, Clerk.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Demurrer.

Comes now the above-named defendant and demurs to the complaint here on file in the above-entitled cause,

for the reason that the said complaint does not state facts sufficient to constitute a cause of action.

W. E. CREWS,
Attorney for Defendant.

[Endorsed]: No. 183-A. United States of America, District of Alaska, Division No. 1. In the United States District Court in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish & Lumber Company, Defendant. Demurrer. Filed November 4th, 1902. W. J. Hills, Clerk.

Copy received.

MALONY & COBB,
Attorneys for Plaintiff.

In the United States District Court for the District of Alaska, Division No. 1.

Tuesday, December 2d, 1902.

EDWARD A. CHASE, Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY, Defendant.
No. 183-A.

Order Overruling Demurrer.

And now, on this day, this cause came on to be heard on the demurrer of the defendant to the complaint of the plaintiff herein, and after argument had, the Court

being fully advised in the premises, overrules said demurrer, and the defendants are given 30 days in which to answer herein.

M. C. BROWN,
Judge.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Answer.

Comes now the defendant and for answer to plaintiff's complaint, on file herein, admits, denies and alleges as follows:

I.

That for the latter clause of paragraph 1, of plaintiff's complaint, defendant has no knowledge or information sufficient to form a belief, and, therefore, denies the same.

2.

Answering paragraph 2, defendant alleges that it did enter into a contract in writing with plaintiff; and as to the terms and conditions of said contract, defendant herewith refers to said contract, which is in writing.

3.

As to paragraph 3 of plaintiff's complaint, defendant denies the allegations therein contained.

4.

Answering paragraph 4, defendant denies each and every allegation therein contained.

5.

As to paragraph 5, defendant allegss that it has no knowledge or information sufficient to form a belief and, therefore, denies the same.

Answering paragraph 6, defendant denies each and every allegation therein contained, except as hereafter alleged.

For further, separate and affirmative defense, defendant alleges that plaintiff failed and neglected to in anywise perform the conditions of the contract of employment on his part; and that the plaintiff is unskilled, negligent and incompetent, and in all respects *formed* to perform the duties for which he was employed; and the defendant was compelled to and did employ other persons to perform the duties for which the said plaintiff was employed; that plaintiff in no respect complied with the terms of his contract, and his representations as to his knowledge, skill and ability were false; that by reason of the unskilfulness, want of knowledge and lack of experience on the part of said plaintiff, defendant was compelled to dispense with his services by mutual agreement between the plaintiff and the defendant on or about the 24th day of June, 1902, at which

time plaintiff and defendant had a mutual, full, complete and absolute settlement of all differences between them. Defendant then and there paid to the plaintiff all sums of money due the plaintiff for his services theretofore rendered; which settlement was in all respects satisfactory to the plaintiff in all particulars; and plaintiff then and there made, executed and delivered his receipt in writing in full and of all demands, which receipt defendant now holds, and which settlement was a complete and absolute one, and satisfactory to all parties at the time.

Defendant denies that it, at this time, is indebted to the plaintiff in the sum of $2088.33, or any other sum whatsoever.

Wherefore, defendant prays that it go hence without day and have judgment for its costs and disbursements.

W. E. CREWS,
Attorney for Defendant.

United States of America,
District of Alaska. } ss.

I, W. E. Crews, being first duly sworn, on oath, say: That I am the attorney for the defendant in the above-entitled action; that I have read the foregoing answer and know the contents thereof, and believe the same to be true; that I make this affidavit because none of the officers or agents of the defendant are now within the District of Alaska; and all of the material allegations of said answer are within my knowledge.

W. E. CREWS.

[Endorsed]: 183-A. United States of America, District of Alaska, Division No. 1. In the United States District Court in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Answer. Filed January 7, 1903. W. J. Hills, Clerk.

In the United States District Court in and for the District of Alaska, Division No, 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER CO.,
Defendant.

Reply.

Now comes the plaintiff and for reply to the answer of the defendant, admits and denies as follows:

1.

He admits that the defendant paid the plaintiff for his services rendered prior to June 24th, 1902.

2.

He denies all and singular the other and remaining allegations of said complaint, and says that the same are untrue.

MALONY & COBB,
Attorneys for Plaintiff.

United States of America,
District of Alaska. } ss.

Edward A. Chase, being first duly sworn, deposes and says: I am the plaintiff in the above-mentioned action; I have heard read the foregoing reply and know the contents thereof and the matters and things therein set out are true as I verily believe.

EDWARD A. CHASE.

Subscribed and sworn to before me this 28th day of January, 1903.

[Seal] E. F. ROSE,
Notary Public in and for Alaska.

Service of the above and foregoing reply is admitted to have been duly made this 28th day of January, 1903.

W. E. CREWS,
Attorney for Defendant.

[Endorsed]: 183-A. United States of America, District of Alaska, Division No. 1. In the United States District Court in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Reply. Filed January 29th, 1903. W. J. Hills, Clerk.

In the United States District Court for the District of Alaska, Division No. 1.

Thursday, February 12, 1903.

EDWARD A. CHASE, Plaintiff,
vs.
ALASKA FISH AND LUMBER CO., Defendants. } No. 183-A.

Trial.

Now on this day this cause having come on regularly for trial, both plaintiff and defendant appearing by their respective counsel, plaintiff being represented by Messrs. Malony & Cobb, defendant being represented by W. E. Crews, Esq., and on announcing ready for trial the following proceedings are had: Roy Burnett, J. C. Burgess, Fred L. Weaver, J. A. Mason, Ben Bullard, S. J. Mathews, R. T. Harris and A. M. Ross, were selected as jurors to try the issues in this case and it appearing to the Court that the regular panel of petit jurors is exhausted, it is ordered that the clerk issue a special venire directing the United States marshal to summon from the body of the District and not from bystanders, six talesmen qualified as jurors to complete the panel herein. Thereafter the venire being returned, Wilbur Purdy, John Hill, and George Burford were selected

as jurors, and it appearing to the Court that the special venire is exhausted and but eleven jurors in the jury-box, and counsel for both parties hereto agreeing to go to trial with a jury composed of eleven men, the jury was sworn to try the issues thereof. Whereupon Edward A. Chase and H. E. Biggs were sworn to testify in behalf of the plaintiff and after the offering of exhibit by plaintiff, plaintiff rested his cause: thereupon counsel for defendant offered in evidence affidavit of Mr. J. D. Carroll and the defendant rested his cause; whereupon Edward A. Chase and W. E. Briggs were recalled and testified in behalf of the plaintiff in rebuttal, and plaintiff again rested his cause; thereupon defendant presented his motion for the Court to instruct the jury to return a verdict for defendant which, after argument had, the Court being fully advised in the premises, denies and to the ruling and order of the Court defendant, by counsel, excepts and after argument by counsel, the jury being duly instructed as to the law in the premises, retired in charge of a sworn bailiff for deliberation and thereafter returned into court and being called and each answering to his name, presented their verdict which is in the words and figures as follows:

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Verdict.

We, the jury selected, impaneled and sworn in the above-entitled and numbered cause, find for the plaintiff, and assess his damages at the sum of seventeen hundred and seventy-three dollars ($1773.00),

J. A. MASON,
Foreman.

To the above verdict counsel for defendant excepted. Thereupon the jury was discharged from further consideration of this cause.

[Endorsed]: No. 183. United States of America, District of Alaska, Division No. 1. In the United States District Court in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Verdict. Filed February 12th, 1903. W. J. Hills, Clerk.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Motion for New Trial.

Comes now the above-named defendant and moves the Court to set aside the verdict heretofore on the —— day of February, 1903, rendered in the above-entitled cause, and grant the defendant a new trial for the following reasons:

1.

The complainant in the above-entitled cause does not state facts sufficient to constitute a cause of action; and the allegations therein does not support the verdict as rendered.

2.

Surprise which ordinary prudence could not have guarded against.

Newly discovered evidence material to defendant's defense, which it could not with reasonable diligence have discovered, and produced at the trial.

4.

Excessive damages appearing to have been given under the influence of passion or prejudice.

5.

Insufficiency of the evidence to justify the verdict, and that it is against the law.

6.

Errors of law occurring at the trial are excepted by the defendant. This motion is based upon the files and records in the case, and affidavits hereafter to be filed.

W. E. CREWS,
Attorney for Defendant.

[Endorsed]: 183-A. United States of America, District of Alaska, Division No. 1. In the United States District Court in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. the Alaska Fish & Lumber Company, Defendant. Motion for a new trial. Filed February 16th, 1903. W. J. Hills, Clerk.

Due service of a copy of the within motion is admitted this 16th day of February, 1903.

MALONY & COBB,
Attorneys for Plaintiff.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.
No. 183-A.

MALONY & COBB, for Plaintiff.

W. E. CREWS, for Defendant.

Decision of the Court on Motion for a New Trial.

MELVILLE C. BROWN, Judge.—This action was tried before a jury on February 12th, 1903, and the jury returned a verdict for the plaintiff in the sum of $1773.00. Thereafter and within the time provided by law, on February 16th, 1903, the defendant filed its motion for a new trial in words and figures as follows, omitting the caption to wit:

"Comes now the above-named defendant and moves the Court to set aside the verdict heretofore, on the 12th day of February, 1903, rendered in the above-entitled cause and grant the defendant a new trial for the following reasons:

I.

The complaint in the above-entitled cause does not state facts sufficient to constitute a cause of action, and the allegations therein does not support the verdict as rendered.

2.

Surprise which ordinary prudence could not have guarded against.

3.

Newly discovered evidence material to defendant's defense, which it could not with reasonable diligence have discovered and produced on the trial.

4.

Excessive damages appearing to have been given under the influence of passion or prejudice.

5.

Insufficiency of the evidence to justify the verdict, and that is against law.

6.

Errors of law occurring at the trial and excepted to by the defendant.

This motion is based upon the files and records in this cause, and the affidavits hereafter to be filed.

W. E. CREWS,

Attorney for Defendant."

Time was requested and granted within which to file affidavits in support of the motion for new trial, and these having heretofore been filed, the case now comes on

for hearing at this present term of court on motion so supported.

It may be well first to address our attention for a few moments to the character of the motion itself. The pleader in this case, as in so many others in this court, has contented himself with reciting the statutory grounds for motion for a new trial, without setting out any specific cause or ground therefor whatsoever. I have frequently decided that a motion for a new trial in the language of the statute, making no specification of the actual and particular grounds relied upon, is of no avail, and does not direct the attention of the Court to any error; much less does it require the Court to pass upon claimed errors occurring at the trial.

Under the California Code, a statement is required to be filed in which shall be specified the particular errors upon which the moving party will rely. The motion for a new trial refers to this specification, and unless the specific error is clearly stated, the court of nisi prius may decline to consider them; and the Appellate Court will refuse to consider any error occurring on the trial not specifically presented in such statement.

Reynolds vs. Lawrence, 15 Cal. 361.
Walls vs. Preston, 25 Cal. 61.
Moore vs. Murdock, 26 Cal. 524.
Burnette vs. Pacheco, 27 Cal. 410.
Partridge vs. San Francisco, 27 Cal. 417.
Ziegler vs. Wells F. & Co., 28 Cal. 265.
Barsto vs. Newman, 34 Cal. 91.

Thompson vs. Patterson, 54 Cal. 546.

Crane vs. Glading, 59 Cal. 393.

25 Cal. 483.

These cases, and particularly 25 Calif. 483, not only tend to show that the specification must be made, but the particularity with which such specifications are required; and appeals were frequently dismissed under the California practice where such specifications had not been filed.

People vs. Goldberg, 10 Cal. 312.

People vs. Comedo, 11 Cal. 70.

Sayre vs. Smith, 11 Cal. 112.

The specifications of errors in a statement is in no sense an assignment of errors. An assignment of errors as understood in the common-law sense is never used under the code as a part or as pertaining to the statement required by the statute.

Hutton vs. Reed, 25 Cal. 483.

Under our statute in Alaska, the matter of exceptions is treated in sections 221, 222 and 223. Section 223 refers to the statement in the following language:

"The statement of the exceptions when settled and allowed shall be signed by the Judge and filed with the clerk and thereafter it shall be deemed and taken to be a part of the record of the cause. No exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal, or made wholly upon matters in writing and on file in the court."

No time is fixed by our statute within which the statement here referred to shall be filed, and under our prac-

tice, the statement is deemed equivalent to a bill of exceptions that may be filed at any time during the term; or, where the decision or trial is had on the last days of the term, within thirty days after the close of the term, and this time may be extended by order of the Court or Judge entered in term time. Whether our rules of practice are entirely in harmony with this statute may be questioned, but they seem sufficiently so to be enforced and adhered to in this behalf.

A motion for a new trial must be filed within three days after the rendition of the verdict or other decision sought to be set aside, but provision is made that affidavits may be filed in support of certain grounds of motion at a later date, and the time for filing these may be also extended.

It is clear that the statement relied on by the California courts which specify the particular errors complained of, can by no possibility be before the Court at the time the motion for a new trial is considered. Should it be required to be filed before the motion for a new trial is to be considered by the Court, and it were not so filed, then under the California decisions the motion for a new trial would be overruled as a matter of course and all rights of appeal as to errors occurring at the trial would be lost to the moving party. Our statutes seems to contemplate that this statement should not be filed, but that the motion for a new trial itself should present the errors complained of as clearly and as specifically as the statement required under the California Code. Section 229 of our statute determines the character of the motion for a new trial, and it is in the following language:

"In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no, cause of new trial not so stated shall be considered or regarded by the Court."

The language of this section as to the motion is fully as mandatory in its terms as the statute of California requiring the errors complained of to be specifically set forth in the statement. It therefore follows, that unless this specification of errors in motion for a new trial as clearly sets forth the errors relied upon as is required by the statement referred to in the California Code, then the court at nisi prius is not required to consider or regard the same in passing the motion for a new trial.

I now refer to the substance of the motion; and considering the first specification briefly, which is equivalent to a general demurrer to the complaint on the ground that the same does not state facts sufficient to constitute a cause of action. In support of this ground of the motion, counsel for the defendant argued with great vigor and earnestness that the complaint is a claim for labor and services, and not for damage for breach of contract, and cites James vs. Allen County, 44 Ohio St. 226, S. C. Am. Rep. 821. This case holds in effect that—

"Where a servant is wrongfully discharged, but his wages are paid up to that time, he cannot recover for future installments but only for breach of contract."

The case reviews at considerable length the holdings of different courts upon questions involved. In this case, under a contract for a specified term, the plaintiff entered upon a discharge of his duty and before the completion of the term was discharged by the defendant as it was

claimed without any just or reasonable cause. The defendant set up in their answer as a defense a former suit wherein the plaintiff had recovered of the defendant $205.30, and the complaint in the former case was in the exact terms of the complaint in the latter case excepting as to the amount. The Court, after discussing many of the authorities upon the various questions raised held, as stated in the syllabus, that the party could sue for the breach of the contract, but could have but one recovery and that would be a bar to a future suit. James recovered in the District Court. The case was appealed to the Supreme Court of the State, and the plea of former recovery was sustained and the judgment of the district court reversed.

The doctrine of constructive service for which suit could be brought lawfully, as it is claimed, at one time in England and in the some of the states of the United States, seems to have been overturned as the law of England and mainly so in the states of the Union. It is said in Munday vs. Leverich, 4 Daly, 401, that a servant wrongfully dismissed cannot wait until the expiration of the period and then sue for his whole wages on the ground of constructive service, his only remedy being an action on the contract for hire.

Howard vs. Daly, 61 N. Y. 62, S. C. 19 Am. Rep. 285.

It would seem that Alabama, Mississippi, Missouri and Wisconsin disapprove the doctrine of constructive service.

Without further consideration of this question, it is deemed sufficient to say that the great weight of authority

now is, that suit for constructive services under such conditions as are presented in the case at bar, cannot be maintained.

Chamberlain vs. Morgan, 68 Pa. St. 168.
Willoughby vs. Thomas, 24 Gratt. 522.
Chamberlain vs. McCallister, 6 Dana, 352.
Whitaker vs. Sandifer, 1 Duvall, 261.
Miller vs. Godard, 34 Me. 162.

I do not therefore consider the many other authorities furnished by counsel upon this question. I heartily agree with counsel for the defendant as to the law of the proposition. But what does the complaint in this case show? Is it an action for damage for unlawful discharge, or is it for constructive service? Counsel for the defendant seems to think the action is one for constructive service and not for damages for the unlawful discharge and violation of the terms of the contract of hire.

The complaint in this case, after setting out the terms of the contract of hire, the wages to be paid, and alleging that the plaintiff pursuant to the terms of the contract entered upon the discharge of his duties thereunder and fully performed said contract on his part until the 24th day of June, 1902, and was then and ever since has been ready, willing, and able to perform his duties as such superintendent under and pursuant to said contract; further alleges that on the 24th day of June, 1902, the defendant without cause and in violation of said contract discharged plaintiff from its employment and refused to further permit him to perform said contract. Then fol-

lows an allegation as to the peculiar nature of the contract of hire and the impossibility for the plaintiff to secure other employment of like character during the fishing season—all of which is perhaps unnecessary and is pleading evidence instead of ultimate facts necessary to the complaint. The complaint further shows that the plaintiff has been paid by the defendant all wages due up to the time of the discharge, and then follows the allegation that by reason of the breach of the contract by defendant, plaintiff has been damaged in the following sums: Loss of wages, $1,633.33; expenses for board and lodging, $410.00; expense return trip to Seattle, $25.00, making an aggregate of $2,068.33, and prays judgment for said sum with costs.

It may be said of that part of the complaint setting out the specific claim for loss of wages, etc., that it is an enumeration of the particular damages that plaintiff has sustained by the breach of the contract. This was an unnecessary allegation in the complaint, and like the other is a statement of evidential facts and not proper as an allegation. It is this part of the complaint that is perhaps somewhat misleading, and that counsel for defendant contends makes it an action for constructive services rather than an action, for a breach of the contract from the discharge of the plaintiff. It may be said perhaps that the complaint possesses a double aspect, and that the pleader at the time of drawing the complaint was not altogether sure of the law controlling the matter and stated such matters as he believed would entitled him to a recovery on either theory. I think a motion to strike out of the pleading all of those evidential facts following

the allegation as to the breach of the contract in discharging the plaintiff, might have been sustained.

So, comparing the complaint, or that part of it down to the allegation of the discharge and the wrongful breach of the contract with the precedents furnished in the law books, we find that it agrees with nearly all in stating a cause of action for a breach of the contract of hire, except in the allegations as to the amount of damages the plaintiff has received by reason of such breach, which is supplied in a later allegation. And while it is clear that the complaint presents this double aspect, it cannot be said that it does not state facts sufficient to constitute a cause of action even for a breach of the contract and a violation thereof by the unlawful discharge of the plaintiff by defendant. It is the opinion of the court, therefore, that this ground of the motion for new trial is not well taken.

The next ground that the court feels bound to consider is as to newly discovered evidence. This ground of the motion in this case is supported by affidavit and the claimed newly discovered evidence is set out in the affidavit at length. Now it is a well-settled rule of law that newly discovered evidence, to be available, (1), must have been discovered since the trial; (2) must not be merely cumulative, or (3) go to the impeachment of witnesses. This has been so frequently decided by the courts that a citation of authorities in support of the proposition is unnecessary. It becomes necessary, therefore, to determine whether there is anything presented in the affidavit in support of the motion for new trial; that is, in fact, newly discovered evidence.

The evidence on behalf of the defendant in this case on the trial consisted practically of an affidavit made by the attorney for the defendant which sets forth the matters which the absent witness J. D. Carroll would answer to if present in court. This affidavit is briefly as follows: "That the plaintiff instead of the defendant is guilty of breaking said contract of employment; that the plaintiff failed to comply with the terms of the contract on his part, and that he was not a competent and efficient man as he represented himself to be; that plaintiff was unable to perform the duties for which he was employed and that he failed and neglected to perform them and defendant was compelled to dispense with his services on that account; that the plaintiff was not prevented from securing other employment such as he was competent to perform, by reason of the acts of the defendant."

It will be observed that this affidavit goes largely to the competency of the plaintiff and to show that he was discharged by the defendant because he was unfit for the service for which he was employed, and the names of a number of witnesses who will swear to these facts are given. The affidavit of the defendant's counsel on which he went to trial plainly shows that the question of incompetency was raised, and went to the jury as evidence. Any other testimony therefore, bearing upon the same question, is cumulative and not newly discovered evidence since the trial, that could be received as bearing upon the right of defendant to a new trial at this time.

But among other matter stated in the affidavit is the fact that the plaintiff was intoxicated a very considerable portion of the time, and that his drunkenness rendered

him wholly unfit for the services he had undertaken to perform under the terms of the contract of hire.

As no evidence was offered on the subject of the drunkenness and intoxication of the plaintiff, that might under some circumstances be newly discovered evidence that would entitle the defendant to consideration on this motion. It is also stated that the plaintiff was insubordinate and disobedient to those placed over him and in charge of the business of the defendant at the time. This might also be considered newly discovered evidence under some circumstances. In Darst vs. Mathicoon Alkali Works, 81 Fed. 284, it is said:

"The use by a salaried employee of a corporation of insulting, disrespectful and abusive language to any officer or superior employee thereof in connection with the duties of the former, or his refusal to obey, or his advising other employees to disobey the orders of any superior, is ground for discharging him."

In McCormick vs. Demary, 7. N. W. Rep. 87, it is held that a master has a right, independent of an agreement to that effect to discharge his hired servant when, by intoxication he unfits himself for the full and proper performance of all his duties. But the question here is not whether drunkenness and insubordination of the plaintiff are grounds for discharge, but whether these matters as set up in the affidavit are newly discovered evidence. It is perfectly clear that counsel for the defendant at the time of the trial was not advised of the existence of this evidence or he would certainly have included it in his affidavit for continuance, and while they may be taken as matters beyond the knowledge of the defendant's coun-

sel at the time he made his affidavit for continuance, can it be said that they were not in the knowledge of the defendant company? Was not Carroll, the manager of the defendant, fully advised of all these facts when he discharged the plaintiff?

The affidavits filed clearly show that this knowledge was within the keeping of the general manager of the company at the time of the discharge of the plaintiff, and these were among the reasons, if not the chief reasons, that induced the general manager of the defendant company to discharge the plaintiff in this case. Can we say, then, that this is newly discovered evidence? Something that has been learned by the defendant—not by his attorney—since the trial of this case? The mere statement of the proposition is sufficient to show that this is not newly discovered evidence which comes within the purview of the statute so as to entitle the defendant's motion to be sustained on this ground.

But it is very earnestly urged in this case that the chief witness for the defendant, W. D. Carroll, could not be present at the trial; that he was hindered and delayed and unable to be present, and that because of this fact the case of the defendant practically went by default, and that the verdict obtained against the defendant is wrong and unjust, and for this reason judgment should be awarded to the plaintiff on the verdict returned by the jury. The showing made by the affidavit of Mr. Carroll as to his inability to be present, is not, in my opinion, such as entitles him or the defendant in this case to consideration at the hands of the court. Mr. Carroll claims that he went east on other important

business; that he was delayed in attending to this business; that he was delayed en route by reason of heavy snows, and all such matters. But the fact is the trial of this case was delayed for many weeks, 40 days, waiting for Mr. Carroll's return, and there is nothing in any of the circumstances that he presents that shows or tends to show that he might not have been present in Juneau had he made any effort to do so long before this case was tried, and that his failure to be here was purely a matter of neglect on his own part and on part of the company. If a man whose duty it is to attend to business in court goes somewhere else to attend to other duties that he thinks more important, when he does so he takes all of the risks of a judgment being entered against him because of his absence and the absence of his testimony that may be important to a defense. It seems to have been, in days gone by, a common practice in this court for men who had business at other points to pay no attention whatsoever to the business in court, but to go way to attend to other business without reference to matters pending in court. Whether this is true or not, or whether it has ever been, I do not know; but it is not true now. Men cannot go roving over the whole country without ever attempting to attend to cases they may have in court. It may as well be understood now, once and for all, that when a man has business pending in court for trial, they must be here on the ground ready for trial unless they can show the clearest excuse for not doing so. I do not consider that Mr. Carroll's affidavit furnishes any reasonable excuse for his absence. It simply shows that he chose to be somewhere else be-

cause he thought other business engagements were more important, and that is all it shows. The matters set up in the affidavit are not newly discovered evidence, and the only indication of merit is that it is stated Mr. Carroll was necessarily absent. As before stated, in my opinion, this does not cleary appear by the affidavit and is wholly inconsistent with the facts of this case as shown by the records.

The other grounds of the motion the court declines to consider because not stated specifically as required by the statute, save the question as to the insufficiency of the evidence; and on this latter ground the verdict cannot be disturbed.

The attorney for the defendant corporation seems to me to have done everything in aid of his client that an honorable attorney could do: first, to secure a continuance of the case, then on the trial of the same, and it is with regret that the Court feels compelled to overrule the motion for a new trial because of the Court's sympathy with the attorney who has so earnestly endeavored to save his client from the effects of the client's negligence and want of reasonable care for its own protection.

The motion for a new trial is overruled.

To which said ruling of the Court the defendant here and now excepts.

MELVILLE C. BROWN,
Judge.

[Endorsed]: No. 183-A. United States of America, District of Alaska, Division No. 1. In the United States

District Court, in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish & Lumber Company, Defendant. Decision of the Court on Motion for a New Trial. Filed May 6th, 1903. W. J. Hills, Clerk.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,

vs.

No. 183-A.

ALASKA FISH AND LUMBER COMPANY,
Defendant.

Judgment.

This cause came on regularly for trial at the December term, 1903, of this court, on the 13th day of February, 1903. Messrs. Malony & Cobb appearing for the plaintiff, and Mr. W. E. Crews, for the defendant; and was tried to a jury duly selected, impaneled and sworn; and the jury, having heard the evidence, the arguments of counsel and the instructions of the Court, retired in charge of a bailiff to consider their verdict, and after due deliberation, returned in open court a verdict in favor of the plaintiff and assessed his damages at the sum of seventeen hundred and seventy-three dollars ($1773.00). And the defendant thereupon within due time filed a motion for a new trial, which said motion was taken under advisement by the Court, at said term

for further consideration; and the Court having fully now considered of said motion, and being fully advised in the premises, is of the opinion that the law is for the plaintiff.

It is therefore considered by the Court and so ordered and adjudged, that the said motion be, and the same is hereby, in all things, overruled.

And upon consideration of the trial and verdict of the jury aforesaid

It is considered by the Court and so ordered and adjudged that the plaintiff, Edward A. Chase, do have and recover, of and from the defendant, Alaska Fish and Lumber Company, a corporation, the sum of seventeen hundred and seventy-three dollars ($1773.00), with interest thereon from the said 13th day of February, 1903, at the rate of eight per centum per annum, and all costs in this behalf incurred taxed at ——— dollars, for all of which let execution issue.

Done in open court this May 6th, 1903.

M. C. BROWNE,
Judge.

[Endorsed]: 183-A. United States of America, District of Alaska, Division No. 1. In the United States District Court, in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. the Alaska Fish and Lumber Company, Defendant. Judgment. Filed May 6th, 1903. W. J. Hills, Clerk.

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,

vs.

ALASKA FISH AND LUMBER COMPANY,
Defendant.

Petition for Writ of Error.

The above-named defendant conceiving itself aggrieved by the judgment in the above-entitled cause rendered therein on the 6th day of May, 1903, in favor of the plaintiff, and against the defendant; which said judgment and proceedings incident thereto are in many particulars erroneous, to the great injury and prejudice of your petitioner. Manifest error has been made in said cause, as fully appears from the assignment of errors, and bill of exceptions filed herewith.

Now, therefore, that your petitioner may obtain relief in the premises, and opportunity to show and have corrected the errors complained of, your petitioner prays that he be allowed a writ of error in said cause; and that upon giving your petitioner's bond, as required by law, that the judgment therein be superseded, and all proceedings be stayed, and execution withheld; and that a transcript of the record, and all papers in this case duly authenticated and be transmitted to the honorable

United States Circuit of Appeals for the Ninth Circuit, for the determination of said error.

(Signed) ALASKA FISH AND LUMBER COMPANY,
By W. E. CREWS,
Its Attorney.

Dated at Juneau, Alaska, this —— day of June, 1903.

[Endorsed]: Copy. In the United States District Court, for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Petition for Writ of Error.

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Assignment of Errors.

Comes now the Alaska Fish and Lumber Company, and makes and files the following assignment of errors in the above-entitled cause; which, said defendant, and plaintiff in error, will rely upon in the Circuit Court of Appeals for the Ninth Circuit, for relief upon the judgment rendered in said cause in the court below.

1.

Because the Court erred in overruling defendant's de-

murrer to plaintiff's complaint, for the reason that the said complaint does not state facts sufficient to constitute a cause of action.

In this, the said plaintiff in his said complaint declares upon his contract for hire, and seeks to enforce the said contract as for constructive wages.

And, for the further reason, that the said contract upon its face shows that the defendant had the right under said contract to discharge the plaintiff at any time he proved to be unsatisfactory.

2.

The Court erred in his instructions to the jury wherein he instructed the said jury, "That the true rule as to the measure of damages if plaintiff is entitled to recover at all under the evidence and these instructions, would be the amount due on the contract from the first day of March up to the present time less the amount that has been paid. That is the true rule as to the measure of damages."

3.

The Court erred in refusing and denying the defendant's motion for a new trial; and for ordering judgment to be entered for the plaintiff.

And for errors assigned, and other manifest errors appearing in the record, the defendant Alaska Fish and Lumber Company prays that the judgment of the lower court be reversed, and this cause be remanded with instructions to grant a new trial.

ALASKA FISH AND LUMBER CO.,

Per W. E. CREWS,

Its Attorney.

[Endorsed]: Copy. In the United States District Court, for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Assignment of Errors.

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Order Allowing Writ of Error.

Upon reading and considering of the petition of the defendant for writ of error in the above-entitled cause it is hereby ordered that the writ of error be allowed, and that all proceedings upon the judgment be stayed and further proceedings on execution be also stayed as prayed for, upon the plaintiff executing a good and sufficient supersedeas bond to prosecute said writ to effect, and moreover, pay all costs and damages sustained by the plaintiff if the defendant fail to make good its plea in the sum of twenty-five hundred dollars ($2500.00), to be approved by this Court.

MELVILLE C. BROWN,
Judge.

[Endorsed]: Copy. In the United States District Court for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendants. Order Allowing Writ of Error.

United States of America,
District of Alaska. } ss.

Writ of Error.

The President of the United States, to the Judge of the United States District Court, for the Disrict of Alaska, Division No. 1, at Juneau, Greeting:

Because in the record and proceedings, as was in the rendition of the judgment of the appellee which is in the said District Court before you between Edward A. Chase, plaintiff, and the Alaska Fish and Lumber Company, a corporation, defendant, a manifest error hath happened to the damage of the Alaska Fish and Lumber Company, as appears by its complaint; we being willing if such error, if any hath been, should be duly corrected, and full and speedy justice to the parties in this behalf do command you, if judgment be given therein, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court, at the city of San Francisco, State of California, together with this writ, so that you may have the same at that place within thirty days from the date hereof, in said court, to be there and then held; that the record and proceedings, aforesaid, be inspected, and the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 18th day of June, A. D. 1903.

W. J. HILLS,
Clerk of the United States District Court for the District of Alaska, Division No. 1, at Juneau.

Let the foregoing writ issue.

MELVILLE C. BROWN,
Judge.

[Endorsed]: Copy. In the United States District Court, for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Writ of Error.

United States of America,
District of Alaska. } ss.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Citation.

To Edward A. Chase, Plaintiff in the Above-entitled Action, Greeting:

You are hereby cited and admonished to be and to appear before the United States Circuit Court of Ap-

peals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty days after the date hereof, pursuant to a Writ of Error filed in the clerk's office of the United States District Court for the District of Alaska, Division No. 1, wherein the Alaska Fish and Lumber Company is plaintiff in error in said action, and you, Edward A. Chase, are the defendant in error, and plaintiff in said action, to show cause, if any there be, where the judgment in said writ of error should be corrected and speedy justice should be done to the parties in that behalf.

Dated this 18th day of June, 1903.

MELVILLE C. BROWN,

Judge of the United States District Court for the District of Alaska, Division No. 1, at Juneau.

I hereby acknowledge service of the above citation at Juneau, Alaska, this —— day of June, A. D. 1903.

MALONY & COBB,

Attorney for the Plaintiff.

[Endorsed]: Copy in the United States District Court, for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Citation.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Bond on Writ of Error.

Know all men by thes presents, that we, the Alaska Fish and Lumber Company, a corporation, as principal, and Horace Cumminns, Frank Thayer and C. W. Young, as sureties, are held and firmly bound unto the above named Edward A. Chase in the sum of twenty-five hundred dollars ($2500.00) to be paid the said Edward A. Chase, for the payment of which, well and truly to be made, we bind ourselves, our executors and administrators firmly by these presents.

Sealed with our seals, and dated this 17th day of June, 1903.

The conditions of the above bond are such, that whereas, the above-named defendant, the Alaska Fish and Lumber Company, has prosecuted a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered and entered in the above-entitled cause by the United States District Court in and for the District of Alaska, Division No. 1, on the 6th day of May, 1903.

Now, therefore, the consideration of this obligation is such that, if the said Alaska Fish and Lumber Company shall prosecute its said writ to effect, and answer all damages and costs, if it fail to make good its plea, then the above obligation shall be void, otherwise to remain in full force and effect.

ALASKA FISH AND LUMBER COMPANY.
By W. E. CREWS,
Its Attorney.
HORACE CUMMINNS,
FRANK THAYER,
C. W. YOUNG,

Signed and sealed and delivered and taken and acknowledged this 17th day of June, 1903, before me.

W. J. HILLS,
Clerk of the United States District Court in and for the District of Alaska, Division No. 1.

The foregoing bond is hereby approved this 18th day of June, A. D. 1903.

MELVILLE C. BROWNE,
Judge.

[Endorsed]: No. 183-A. United States of America, District of Alaska, Division No. 1. In the United States District in and for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Bond on Writ of Error. Filed June 18th, 1903. W. J. Hills, Clerk.

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendant.

Bill of Exceptions.

Be it remembered, that this cause came on for trial on the —— day of April, 1903, before the Honorable M. C. Brown, Judge of the above-entitled court, and a jury was duly impaneled and sworn to try the cause; said plaintiff appearing by Malony & Cobb, of counsel, and his attorneys, and the defendants appearing by W. E. Crews, their attorney.

Whereupon, the plaintiff, Edward A. Chase, was called and testified as witness in his own behalf, as follows:

E. A. CHASE, the plaintiff, being first duly sworn, on his oath testified as follows, on

Direct Examination.

(By Mr. COBB.)

State your name. A. Edward A. Chase.

Q. How old are you Mr. Chase?

A. Forty-nine the 6th day of last April.

(Testimony of E. A. Chase.)

Q. Where do you reside?

A. Seattle is my home at present.

Q. What is your occupation, and what has been your occupation for the last—well, a number of years?

A. Catching, curing, packing and handling fish.

Q. How long have you been engaged in that occupation? A. Thirty years.

Q. Tell the jury briefly in what capacities you have served in that business.

A. In 1873 I opened up and went into business in Portland, Maine, producing, catching, curing, buying and selling and handling fish, and was appointed deputy inspector by the Governor of the State. For thirteen years I carried on the business in Portland. In 1886 I lost my health and went to St. Paul, Minnesota, and after staying there a year I recovered my health and took charge of a department wholesale house for Baupre & Keough & Davis of St. Paul, had a contract with them for a year, and stayed with them two years.

Q. When did you come to the Pacific Coast?

A. Well, then I went back to St. Paul under contract with D. D. Mallary and the Laflin Company in charge of the A. or under the charge of the A. Booth Packing Co., and I remained with them a year, until my contract expired. After that contract expired, I took a position with Hartman, Clark & Co., of Chicago for one season. From that I returned to St. Paul again, as my wife's folks lived there and stayed for some time, and in 1892,

(Testimony of E. A. Chase.)

in December, I went to Tacoma to take charge of the Puget Sound Fish Co. and the Cresent Creamery's cold storage plant.

Q. And for what other concerns have you worked?

A. I carried on that business until the Cresent Creamery Co. closed out its business and I bought out the Puget Sound Fish Co. business and incorporated as the North Pacific Company and continued in that business for four years. Then I went in onto the head of the Spokane River and put in a trout fish hatchery, and my business during that time called me to different places, on to the Frazer River, Columbia, Puget Sound, and so on.

Q. State whether you are thoroughly familiar with taking, canning, and preparing for market food fishes such as salmon and other fishes. A. I am, sir.

Q. Do you know the defendant corporation in this case, the Alaska Fish and Lumber Company?

A. Yes, sir, I do.

Q. Examine that paper please—what is that (handing witness a paper writing)?

A. That's a contract I have with the Alaska Fish and Lumber Company.

Q. That the original contract? A. Yes, sir.

Q. That's your signature to the contract, is it?

A. Yes, sir.

Q. Is that also Mr. Carroll's signature, as general manager of that company? A. Yes, sir.

Q. Now, whose are the other signatures?

(Testimony of E. A. Chase.)

A. It was returned at my request for the other signatures to Mankato, and Mr. Wiedle and Mr. Farrell, I don't know their signatures personally.

Q. That contract was returned in due course of the mails? A. Yes, sir.

Q. And delivered to you as the original contract?

A. Yes, sir.

(Offered in evidence. No objection.)

(Marked Plaintiff's Exhibit "A.")

Q. Now, upon the execution of that contract, Mr. Chase, what did you do?

A. Why, I was to assist Mr. Carroll previous to March the first for a time, in anything that he had to do in Seattle in the way of helping him—which I did. And on—(producing memoranda) I always keep a diary and I ask permission to look in that for the dates?

Q. Those references there are to the dates of the occurrences?

A. Yes, sir, I kept a diary of everything that transpired in my employment.

Q. Well—

(Defendant objects to the witness reading from his diary. He may refresh his memory from it.)

COURT.—The witness may refresh his memory as to any matter appearing in the memoranda if it was made at the time.

A. It was made at the time. Mr. Carroll notified me that he was going to make a short run to Shakan, and

(Testimony of E. A. Chase.)

requested me to go with him and make the round trip and back with him in order to look over matters. He said there wasn't anything to do unless we did that, and couldn't anything be done very well until we made the trip. I left with him on the 16th of February and went to Shakan.

Q. Go ahead and tell the jury what else you did—giving the dates as near as you can?

A. We arrived in Shakan on the 24th day of February; and Mr. Carroll—we remained there for eight or ten days, and during that time why Carroll requested me to take up the business affairs, accounts, and so on and straighten up the business as they had just bought from Finn & Young and make a daily report to the Mankato office, checking up the bookkeeper's accounts and so on, which I did. When he went back he took the reports and said he wanted me to remain there in charge of the store business.

Q. Did you go back to Seattle? A. No, sir.

Q. Did you remain there in charge of the store?

A. Yes, sir, in charge of all the company affairs until—

Q. Of the cannery?

A. There was no cannery built at the time you see.

Q. There was one being erected?

A. No, sir, it hadn't been commenced yet.

Q. When did they begin building that?

A. About what the date was I don't recall now.

Q. Approximately?

(Testimony of E. A. Chase.)

A. Well, about March the 10th or 12th—I can tell you exactly from my book?

Q. Well, some time early in March?

A. Yes, sir.

Q. When was it completed?

A. Well, the carpenter work hadn't been completed when I left, yet?

Q. Not when you left in June? A. No, sir.

Q. And you remained there in charge as I understand it until the 24th day of June?

A. Twenty-third day of June he discharged me.

Q. During that time did you perform all your duties as superintendent, to the best of your ability?

A. I did, sir.

Q. State whether or not there had ever been any complaint made up to that time of your being negligent, or incompetent, by the officers of the Company?

A. Not a word, sir.

Q. Now, did Mr. Carroll at the time he discharged you, assign any such reason for so doing?

(Objected to as leading.)

A. No, sir.

(Objection sustained. Answer withdrawn.)

Q. Now when did Mr. Carroll return to Shakan?

A. The first time he went away?

Q. Yes?

A. He returned on April 25th, according to my dates.

(Testimony of E. A. Chase.)

Q. How long did he remain there then?

A. Until May the 4th.

Q. Where did he go then on May the 4th?

A. To Seattle.

Q. When did he return next? A. On the 10th.

Q. The tenth he returned?

A. No; I think he went down about the first, and then came back on the twenty-third.

Q. What reason, if any, did Mr. Carroll assign for discharging you?

A. For communicating the condition of affairs to the President and Secretary and Treasurer of the Company, at Mankato, Minnesota.

Q. Because of a report you made to them?

A. Yes, sir.

Q. Now, state whether or not that report had been called for by the head officials of that company?

(Objected to as immaterial. Objection sustained. Exception.)

Q. Did you make this report you speak of pursuant to a demand or request from the company that it should be made by you?

A. I wrote the president of the company a letter—

Q. Was that pursuant to the demand?

A. Yes, sir.

Q. State whether or not that was made in the course of the performance of your duties as superintendent of that cannery, and made as superintendent.

(Testimony of E. A. Chase.)

(Objected to as incompetent and immaterial under the pleadings, for the reason that the complaint sets up the discharge was not on account of any fault of his, and the answer states that it was on the ground of incompetency. It is not for them to show at this time whether or not—)

By Mr. COBB.—O, I agree with counsel that this is not the proper time for us to make that showing. It is properly rebuttal, and we will offer it as such at the proper time.

Q. Now, what was the reasonable value, Mr. Chase, of the board and lodging that was to be furnished you under this contract?

A. Well, of course at a place like that, it woul be over twenty-five or thirty dollars a month—at Shakan.

Q. What expense have you been put to in securing other board and lodging since?

(Objected to as immaterial. Objection sustained. Exception.)

Q. Now, Mr. Chase, state what it would cost to procure such board and lodging here in Alaska as the company furnished you down there—the reasonable cost?

A. I would say it would cost somewheres about fifty dollars a month.

Q. Have you been to that much expense?

(Objected to as immaterial. Objection sustained Exception.)

Q. Has the company paid any of your expenses for board or lodging since or expenses since?

(Testimony of E. A. Chase.)

A. No, sir.

Q. Have they paid you any salary since the 23d day of June? A. No, sir.

Q. Have they paid or offered to pay your return passage to Seattle? A. No, sir.

(No cross-examination.)

There being no cross-examination, after the plaintiff had read in evidence the contract declared upon in this action, which said contract is as follows, to wit:

This agreement made this 14th day of February, 1902, by and between the Alaska Fish and Lumber Company, a corporation incorporated under the laws of the Territory of Arizona, party of the first part and Edward A. Chase, of Seattle, Washington, party of the second part;

Witnesseth, that said party of the second part agrees with said party of the first part to work for said party of the first part as a superintendent or foreman, or in such other capacity as both parties hereto consent to for the term of one year, beginning March 1st, 1902, in the Territory of Alaska, or elsewhere in the United States as said party of the first part shall desire, and to well and faithfully devote his entire time, efforts and attention during said year to the services of the said party of the first part.

And in consideration thereof, said party of the first part agrees with said party of the second part that so long as he shall faithfully perform his duties in the services of the party of the first part hereunder, said party of the first part will bear and paying his traveling ex-

(Testimony of E. A. Chase.)

penses from Seattle, State of Washington, to Alaska, and return, providing the party of the second part remains in the services of the party of the first part for the term of one year as hereinafter stated and also pay, or furnish free to the party of the second part, board and lodging, and will further pay the party of the second part, the sum of $200.00 per month, payable monthly, and within thirty days after the end of each month.

It is understood and agreed that the party of the second part shall give his time from date until the first of March, 1902, to the party of the first part, without further consideration.

In witness whereof said parties have executed this agreement the day and year aforesaid.

ALASKA FISH AND LUMBER CO.,

By————————

E. A. CHASE, recalled on rebuttal.

Direct Examination.

(By Mr. COBB.)

Mr. Chase, just state how it is in this canning business, wherther it is customary in such business to employ the men—for what term?

(Objected to on the ground that the terms of the employment are merged in writing and therefore the writing is the best evidence. Immaterial and incompetent. Objection sustained.)

Q. State if after you were discharged down there you made any efforts to obtain employment elsewhere, of the

(Testimony of E. A. Chase.)

same or similar employment—same character, as that from which you were discharged from?

A. Yes, sir, I did, sir.

Q. Who did you go to?

(Objected to as immaterial. Objection overruled. Exception.)

A. I made application to Mr. Forbes of the Pacific Packing and Navigation Company., Mr. Barnes at Funter's Bay; and made application to Carlsen, and to Buschman; wrote to the Seattle people themselves, asking them if they had any position—the P. P. N. Co.

Q. Did you succeed in getting a position?

A. I did not.

EDWARD A. CHASE.

After some evidence had been introduced on behalf of the defendant, and the plaintiff having offered some in rebuttal, and the cause having been submitted to the jury, the Court, then gave the following instructions to the jury:

"Perhaps, I should state to you, further that the rule as to the measure of damages, if the plaintiff is entitled to recover at all under the evidence and these instructions, would be the amount due on the contract from the first day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages, although the way I stated it before would amount, perhaps, to the same thing in the end."

To the giving of which instructions, the defendant then and there excepted, and his exception was by the Court duly allowed.

ORAL INSTRUCTIONS OF THE COURT.

CHASE
vs.
ALASKA FISH AND LUMBER CO.

Gentlemen of the Jury: You have in evidence before you a contract of hire for personal services of the plaintiff. I believe under the terms of the contract he was to be paid two hundred dollars per month, with board and his expenses I believe to and from the place where he was to work; that is his expenses from Seattle to and from the place he was to work—provided, of course, he should fulfill the terms of his contract.

Under such a contract, the rights of the party hired and the party hiring are practically this: If the party who agrees to furnish his services is not fairly treated; if he is prevented from performing the service he agrees to by the improper conduct of the party hiring, he may quit the service he has agreed to perform. On the other hand, when a party hires to perform a certain service for another, he is presumed in law to be qualified for the service upon which he agrees to enter. He is presumed to be competent to render the service he agrees to perform. If he fails; if he is incompetent or negligent in the performance of such services, the employer may discharge him. The rights of both parties are mutual. The employee may decline to perform services when he is not treated

as an employee should be, and where he is hindered in the performance of the service required; and there is no recourse against him. If he fails through negligence or incapacity, and the master discharges him, he has no recourse against his employer.

The claim made here on the part of the plaintiff is that there was a contract of hire, which was proved by the submission of the contract of hire; that the plaintiff was competent for the service; that he was wrongfully discharged, and being wrongfully discharged he has a right of action for damages. The law gives him such right of action for damages if what he says in his complaint is true and that is proved by the weight of the evidence. On the other hand, it is alleged in the answer that he was incompetent, negligent and failed to perform the service required under the contract of hire. If that is true, and that proposition is proved by the weight and preponderance of the evidence, the plaintiff has no right to recover in this action.

Whichever party to an action alleges an affirmative proposition, must sustain that allegation by the weight or preponderance of the evidence.

You are the judges of the credibility of witnesses, and the weight to be given the testimony of each of them. What is proved or shown by the evidence, is a matter wholly for your determination. You are not to accept any man's statement as true simply he swears to a state of facts. You are bound to accept each man's statement from the stand under oath as equal to every other man's statement. You may judge from the appearance of people on the stand before you, the manner in which they

give their testimony, whether with candor and apparent honesty, or otherwise; but you should throw no man's testimony aside without reason, or upon any caprice; but you should consider the statement of every man fairly according to his situation as you find it, and weigh it accordingly.

It is sometimes claimed, and it is stated as a proposition of law, that a man who is interested in the result of an action may not be always as truthful and as reliable and as worthy of belief as if he were disinterested; but it sometimes happens that there are men who, notwithstanding their interest, always speak the truth. But you are to determine, as before stated, the weight to be given the testimony of the witnesses.

Mr. Carroll is not present as a witness to testify before you; but under the law, it has been agreed that his statement as read to you should be accepted in place of his testimony if he were here. And under these circumstances you are to receive this statement of fact as made just as if it had been received from the mouth of the witness Carroll. It is admitted that he would swear to these things if he were presonally present and testifying. You are therefore to receive this statement as his testimony, the same as if he were testifying in person from the stand.

Now if you find that this plaintiff is entitled to recover under the evidence before you, it is proper that the Court should give you what under the law is termed a "measure of damages." Before doing so however, I wish to state to you another proposition: Whatever may have been said by the chief officer of the company defendant, as to the cause of the discharge by the superintendent of the com-

pany that is not the only ground of discharge that may be proved in the trial of a case; and the defendant in this case is not bound by that declaration only so far as it may evince a reason for the discharge. Whatever real reason there may have been for the discharge outside of that declaration, may be proven on this trial; hence I have stated to you that if it was proved that the plaintiff was incompetent and negligent of his duties that he might rightfully be disharged as alleged in the answer. So that you are not to consider the declaration alone, but all the evidence in the case bearing upon that question.

Now, as to the measure of damages: That is what the defendant agreed to pay this man—if he has a right to recover at all, viz., two hundred dollars per month and his board. If there were proof upon the question, he would be entitled to the expense of a return trip to Seattle because that as I understand it is a part of the contract Now for what time may he recover? The allegation of the complaint is that they or he was damaged by reason of the discharge and consequent violation of the contract of hire. If the plaintiff had waited until the end of the year specified in his contract of hire, he might recover for the whole term mentioned in the contract—if entitled to recover at all. But the question now is, what was the damage he sustained by reason of such discharge? What the future holds in store for any one, no one can tell. If a man were sick, or should he die, that would terminate his contract of hire and he could recover nothing beyond that period. We are all liable to die at most any time so uncertain is the future that to say a man will live fo any time and may recover damages up to any time in

the future, is a proposition that is too uncertain to constitute a measure of damages. Evidence has been offered in this case on the part of the plaintiff, without objection, that he had made an effort to obtain employment from the time of his discharge I believe, up to the present time; and that he had been unable to secure employment. Because of that declaration, uncontradicted and coming before the Court and jury without objection, I say to you the measure of damages in this case if the plaintiff recovers and you find he is so entitled to do, is the wages he was to receive from the time he was paid off up to the present time, the date of this trial; and such damages for board during the meantime as he is entitled to under the evidence before you.

As to the character of the evidence upon the question of board, you will recall what that is. The defendant did not state what the expense of board was at Shakan but what the expense had been to him, viz., fifty dollars a month. He stated perhaps in the first place that the board down there might cost the company perhaps twenty-five to thirty dollars per month; but it is for you to determine under the evidence just what he is entitled to, and you are to recall just what the evidence was on this point. And if there is any evidence before you—I frankly state I do not recall any—as to the expense of a passage back from Shakan to Seattle, the plaintiff under his contract of hire is entitled to recover that and you should so find.

Perhaps I should state to you further, that the true rule as to the measure of damages, if the plaintiff is entitled to recover at all under the evidence and these in-

structions, would be the amount due on the contract from the first day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages, although the way I stated it before would amount perhaps to the same thing in the end.

Now, I believe I have stated to you the law governing contracts of this kind, and the circumstances under which a party may quit and under which he may be discharged. If you find from all the evidence before you that the plaintiff was discharged without reasonable cause, you should find for the plaintiff such damages as he has sustained by reason of such discharge. If you find that he was rightfully discharged becaue of a failure to perform his duties from neglect in that behalf, your verdict should be for the defendant.

The above and foregoing bill of exceptions was presented to me on the 17th day of June, 1903, within the time allowed by law, and the rules of this court.

Now, therefore, I, MELVILLE C. BROWN, Judge before whom said cause was tried, do hereby settle and allow the same as a correct bill of exceptions, and do order that the same be filed and made a part of the record herein.

Done in open court, Juneau, Alaska, this 18th day of June, 1903.

MELVILLE C. BROWN,

Judge of the United States District Court for the District of Alaska, Division No. 1.

[Endorsed]: Original. In the United States District Court for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendants. Bill of Exceptions.

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

EDWARD A. CHASE,
Plaintiff,
vs.
ALASKA FISH AND LUMBER COMPANY,
Defendants.

Order Extending Time to Docket Cause.

It appearing to the Court from the examination of the record in this cause that the time for preparing the record and docketing the cause in the Circuit Court of Appeals pursuant to the writ of error heretofore granted will expire on the 18th day of July, 1903, and that additional time should be granted to the clerk for the preparation and the docketing of the cause:

It is therefore ordered that the time for preparing said record and transmitting the same to the clerk of the Cicuit Court of Appeals be, and the same is hereby, extended 60 days from the 18th day of July, 1903.

It is further ordered, upon request of the plaintiff in error, that the record in this cause may be prepared by the attorneys for the plaintiff in error presented to the

clerk of this court for examination, comparison and approval.

July 13, 1903.

M. C. BROWN,
Judge.

[Endorsed]: Copy. In the United States District Court, for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendants. Order Extending Time.

In the United States District Court in and for the District of Alaska, Division No. 1, at Juneau.

United States of America,
District of Alaska. } ss.

Clerk's Certificate to Transcript.

I, W. J. Hills, clerk for the United States District Court in and for the District of Alaska, Division No. 1, do hereby certify that the above and foregoing hereunto annexed 65 pages are a full, true and correct transcript of the records and files of all the proceedings in the therein mentioned cause of Edward A. Chase vs. Alaska Fish and Lumber Company, as the same appears of record and on file in my office; and that the same is in accordance with the command of the writ of error in said cause allowed.

This transcript has been prepared by the plaintiff in error, and the costs of examination and the certificate of examination amounting to the sum of 6.35 dollars have been paid to me by the plaintiff in error.

I further certify that a copy of the writ of error in the above-entitled cause was lodged in this office for the use of the defendant in error on the 17th day of June, 1903, before the return day of said writ; and was by me duly delivered to the attorneys for the defendant in error.

In testimony whereof, I have hereunto set my hand and caused the seals of the court to be hereunto affixed at Juneau, on this 23d day of July, 1903.

[Seal] W. J. HILLS,

Clerk of the United States District Court, in and for the District of Alaska, Division No. 1.

United States of America, } ss.
District of Alaska. }

Writ of Error.

The President of the United States, to the Judge of the United States District Court for the District of Alaska, Division No. 1, at Juneau, Greeting:

Because in the record and proceedings, as was in the rendition of the judgment of the appellee which is in the said District Court before you between Edward A. Chase, Plaintiff, and the Alaska Fish and Lumber Company, a corporation, Defendant, a manifest error hath happened to the damage of the Alaska Fish and Lumber Company, as appears by its complaint; we being willing if such error, if any hath been, should be duly corrected, and full and speedy justice to the parties in this behalf do command you, if judgment be given therein, that un-

der your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the court-room of said court, at the city of San Francisco, State of California, together with this writ, so that you may have the same at that place within thirty days from the date hereof, in said court, to be there and then held; that the record and proceedings, aforesaid, be inspected, and the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 18th day of June, A. D. 1903.

[Seal] W. J. HILLS,
Clerk of the United States District Court for the District of Alaska, Division No. 1, at Juneau.

Let the foregoing writ issue.

MELVILLE C. BROWN,
Judge.

[Endorsed]: Original. No. 183-A. In the United States District Court for the District of Alaska, Division No. 1. Edward A. Chase, Plaintiff, vs. Alaska Fish and Lumber Company, Defendant. Writ of Error. Filed June 18, 1903. W. J. Hills, Clerk.

United States of America,
District of Alaska. } ss.

EDWARD A. CHASE,
Plaintiff,

vs.

ALASKA FISH AND LUMBER COMPANY,
Defendant.

Citation.

To Edward A. Chase, Plaintiff in the Above-entitled Action, Greeting:

You are hereby cited and admonished to be and to appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, within thirty days after the date hereof, pursuant to a writ of error filed in the clerk's office of the United States District Court for the District of Alaska, Division No. 1, wherein the Alaska Fish and Lumber Company is plaintiff in error in said action, and you, Edward A. Chase, are the defendant in error, and plaintiff in said action, to show cause, if any there be, where the judgment in said writ of error should be corrected, and speedy justice should be done to the parties in that behalf.

Dated this 18th day of June, 1903.

MELVILLE C. BROWN,
Judge of the United States District Court for the District of Alaska, Division No. 1, at Juneau.

I hereby acknowledge service of the above citation at Juneau, Alaska, this 19 day of June, A. D. 1903.

MALONY & COBB,
Attorney for the Plaintiff.

[Endorsed]: Original. No. 183-A. In the United States District Court for the District of Alaska, Division No. 1. Edward A. Chase, Defendant, vs. Alaska Fish and Lumber Company, Plaintiff. Citation. Filed June 18, 1903. W. J. Hills, Clerk.

[Endorsed]: No. 983. In the United States Circuit Court of Appeals for the Ninth Circuit. Alaska Fish and Lumber Company, Plaintiff, in Error, vs. Edward A. Chase, Defendant in Error. Transcript of Record Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filed August 21, 1903.

F. D. MONCKTON,
Clerk.